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NOTE ON INTERNATIONAL PROTECTION

(submitted by the High Commissioner)

SUMMARY

A description of developments in 1993 in the field of international protection of refugees is contained in the Report of the United Nations High Commissioner for Refugees to the General Assembly through the Economic and Social Council (E/1994/41).

The present Note examines the fundamental concept of international protection and considers ways of meeting the needs of persons of concern to the Office, including those outside of the scope of the 1951 Convention.

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I. BACKGROUND AND INTRODUCTION

1. The flight and exile of the world's twenty million refugees from their homes and their countries is a tragic consequence of the inability or the unwillingness of their Governments to fulfil their responsibility of ensuring respect for their human rights, including the right to personal security, of all the individuals and groups within their territory. The lack of protection within national borders, of which refugee flows are a symptom, also affects the internally displaced and others who have not yet sought, or have not succeeded in reaching, safety in another country. In the present period of transition and upheaval in world affairs, as new States accede to or regain their independance while others are torn in fratricidal violence, there is an alarming proliferation of ethnic and sectarian conflicts, many with the avowed aim of removing one group of people from territory they share with another, violating not only their right to remain in safety at home but also their right ever to return and even their right to life itself. There is as a result every prospect of new, massive refugee flows, coupled with internal displacement and the persistence of current refugee situations. In an international context that includes migratory movements spurred by poverty and economic disruption, population pressures, ecological degradation, and smouldering political conflicts that threaten at any moment to erupt into violent conflicts both within and between nations, the protection of refugees as well as the solution and the prevention of refugee problems present complex challenges for UNHCR, for the States directly concerned, and for the international community as a whole.

2. The Office of the United Nations High Commissioner for Refugees has been charged with the functions of providing international protection to refugees, under the auspices of the United Nations, and of seeking solutions to refugee problems. These functions include ensuring, with and through Governments, the legal and practical protection of refugees, mobilizing and coordinating the deployment of the resources required to ensure their survival and well-being, and promoting conditions in countries of origin that will be conducive to the ideal solution of voluntary repatriation and help prevent future refugee problems. The situations addressed by the Office in performing these functions during the past year have all too frequently involved irreparable human suffering and loss of life. The difficulties confronted have been so considerable as virtually to overshadow the progress made in many areas. In the centre of Africa, sudden and massive new refugee flows fueled by murderous ethnic and political conflict have overwhelmed the reception capacity of neighbouring countries, and, despite measures of emergency preparedness, far outpaced the capacity of UNHCR and the international community to respond effectively and in time. Genocide, civil war, epidemic disease and the lack of food, clean water, shelter, sanitation and personal security have converged in the tragedy of Rwanda to produce a human disaster as well as a refugee crisis of catastrophic dimensions. As with Bosnia and Somalia, the situation in Rwanda demonstrates the limits of humanitarian action in the midst of conflict, as well as the great cost in human misery that can result when early warning is not followed by timely action to avert or contain the outbreak of violence. It also presents daunting challenges for protection, solutions and the prevention of further disasters, not only for UNHCR but for other United Nations and international organizations and for the entire international community.

3. In other parts of the world, as well as in Africa, longstanding refugee situations persist despite international efforts to resolve the conflicts that were

at their source and which continue to impede solutions. In several regions new refugees have been forced to flee armed conflict, generalized violence and grave human rights abuses in their countries of origin. In some cases, refugees, returnees and other persons of concern to the High Commissioner have been subject to murder, rape, torture, unjustified imprisonment and armed attacks, both deliberate and in the crossfire of civil war, on their camps, settlements and homes. In certain instances, asylum-seekers have been rejected at frontiers, detained or confined in closed camps under harsh conditions, intercepted en route to a country of asylum, and forcibly returned to the countries where those who were refugees had reason to fear persecution.

4. On every continent, asylum-seekers have continued to arrive from near and far, sorely taxing the reception capacity, the legal and administrative structures and in many cases the patience and good will of the affected countries. Irregular migration, widespread unemployment and economic difficulties in many countries of asylum and the resurgence of xenophobic sentiments in a number of countries, have continued to strain the institution of asylum, which is crucial for the protection of refugees.

5. Despite these difficulties, progress has been made in many areas, beginning with Africa, where the peaceful transition of South Africa to democratic government is a promising development for the continent. Since the successes of prevention are generally unheralded, it is worth noting that the onset of peace in South Africa means that a major potential refugee crisis has been defused. The repatriation from neighbouring countries to Mozambique, now more than half completed, is a major step towards resolving what had been Africa's largest refugee problem. On other continents, progress includes the projected completion of the Comprehensive Plan of Action for Indochinese Refugees (CPA), preparations for larger scale voluntary repatriation to Myanmar, laying the groundwork in Georgia for the return of internally displaced persons to Abkhazia, the continuing return and reintegration, assisted and monitored by UNHCR, of both refugees and displaced persons in Tajikistan, and, in Guatemala, better prospects for repatriation thanks to progress in internationally sponsored peace negotiations. In every region, almost all Governments have continued to observe, with few exceptions, the principles of refugee law, including the fundamental principle of non-refoulement, ensuring access, where required, for asylum-seekers to procedures for determining refugee status and providing asylum to millions of persons in need of international protection. Renewed respect for the principle of non-refoulement has been demonstrated in the recommendations of regional bodies concerning the treatment of asylum-seekers, in new legislation in several countries and, concretely, by one government's shift from a policy of interdiction and involuntary return of asylum seekers to a policy of temporary refuge in the region.

6. Given the magnitude of the challenges at hand and the new tasks that UNHCR is called upon to perform, particularly in activities linked to the solution and prevention of refugee problems in countries of origin and areas affected by armed conflict, it is essential to adopt new approaches and strategies and to adapt the tools of the past to the needs of the present. In such circumstances, it is useful to re-examine the fundamental concept of international protection - what it means, whom we seek to protect and why - and to consider how the tools that have been used in the past can be adapted better to meet present and future needs. Last year's Note on International Protection (A/AC.96/815) highlighted several key issues

within the themes addressed by the 1992 internal UNHCR Working Group on International Protection, which had been the subject of the previous year's Note. It considered asylum as an instrument of international protection, the impact of recent trends on respect for protection principles, and UNHCR's efforts to foster the prevention and solution of refugee problems through the promotion of respect for human rights, activities on behalf of the internally displaced and persons affected by situations of armed conflict, and voluntary repatriation. The present Note continues this discussion, focusing on a central theme, the notion of international protection itself. It considers the need for international protection as a defining concept in determining that a particular class of persons - refugees - should be of special concern to the international community and included within the mandate and competence of UNHCR, and meeting the need for protection as the guiding principle for the action of the High Commissioner and of the international community on their behalf. The Note will examine, from this perspective, the adequacy of the legal tools available to ensure that protection is granted to those who need it, and what improvements can be envisaged. It also examines briefly some aspects of international protection relating to the prevention and solution of refugee problems in countries of origin and in areas of conflict which were dealt with at length in last year's Note and in the note on Protection Aspects of the Office's Activities on Behalf of Internally Displaced Persons (EC/SCP/87).

7. Part II examines the meaning of international protection, its evolution, content and the varied tools employed to provide it. Part III discusses the adequacy, and the limitations, of the legal tools available to meet refugees' need for international protection, while Part IV discusses how the gaps identified can be filled, or at least bridged, notably through the use of temporary protection and various forms of regional and international harmonization. Part V examines the connection between the concept of international protection and the Office's growing role in promoting solutions and prevention through activities on behalf of returnees, the displaced and other persons within their own countries.

II. THE CONCEPT OF INTERNATIONAL PROTECTION

A. The refugee's need for protection

8. Unlike most other people who leave their country, refugees seek admission to another country not out of choice but out of absolute necessity, to escape threats to their most fundamental human rights from which the authorities of their home country cannot or will not protect them. Left unprotected by their own Government, refugees must seek the protection that every human being requires from the authorities of a country of refuge and from the international community. It is this vital need for international protection that most clearly distinguishes refugees from other aliens.

9. The situation of refugees as uprooted foreigners, usually with scant material resources, often without documentation, deprived not only of the protection of a Government but also of the traditional protective structures of family, clan and community, makes them vulnerable in many ways. The position of refugee women and of children separated from their families is particularly precarious. Already threatened by violence or human rights abuses in their own country, refugees may

face further danger en route to a country of refuge, compounded by the risk of being turned back at (or before reaching) its borders. Even after gaining admission to another country, the refugee may face the problems of violence, criminality, abuse of power and intolerance that are present to varying degrees in all countries, but to which the destitute undocumented alien is all the more exposed. He or she thus needs personal security, including protection from being sent to a place where his or her life or freedom would be endangered. To survive in the country of asylum, the refugee also needs to have some means of subsistence, as well as shelter, health care and other basic necessities. This entails obtaining some form of recognized legal status, providing authorization to work, or at least access to humanitarian assistance, social benefits, and documentation. Beyond what is required for immediate survival, refugees need respect for the other fundamental human rights to which all individuals are entitled without discrimination. Finally, every refugee needs a long term solution that will enable him or her to be integrated into society and to lead a normal life as a full-fledged member of a national community.

10. When the United Nations General Assembly adopted the general refugee definition that was to be used in the UNHCR Statute and, with certain changes, in the 1951 Convention, it decided to move beyond earlier ad hoc definitions, based on specific situations, towards a more universally applicable definition. In the nearly identical formulations employed in the UNHCR Statute and in the 1951 Convention, the lack of national protection is at the core of the concept of refugee. In these instruments, a refugee is a person who is outside his or her country "owing to a well-founded fear of being persecuted" for specified reasons and who "is unable or, because of such fear, is unwilling to avail himself of the protection of his country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."[1] While the risk of persecution clearly involves an absence of effective protection, the second part of the phrase makes a present inability to obtain the protection of one's home country an explicit element of the refugee definition. (For a stateless person, inability to return coupled with a well-founded fear of persecution establish a need for international protection as a refugee.)

11. As the need for protection characterizes the plight of refugees and is key to their identification as persons of concern to UNHCR and to the international community, providing that protection is at the centre of UNHCR's mandate. When the United Nations decided in 1949 to establish UNHCR, the General Assembly explicitly recognized "the responsibility of the United Nations for the international protection of refugees," (General Assembly res.319(IV), (3 December 1949)). (The term "international protection of refugees" was introduced for the first time in the Economic and Social Council (ECOSOC) and General Assembly resolutions on the establishment of the Office.[2]) The overall objective of international protection

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[1] Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), para. 6A(ii) and 6B. See 1951 Convention, Art. 1A(2).

[2] ECOSOC Resolution 248(IX)A (6 August 1949); General Assembly resolution 319(IV) A (3 December 1949). See Holborn, L., Refugees, a Problem of Our Time, The Scarecrow Press, Metuchen, NJ, USA, 1975, p. 99 and n. 9.

is summarized in the Preamble to the 1951 Convention: "to assure refugees the widest possible exercise of ... fundamental rights and freedoms" which all "human beings [should] enjoy ... without discrimination". International protection is thus premised on human rights principles. From this human rights perspective, the reason for the United Nations (meaning, in this context, not merely the institution but the community of nations assembled within it) to assume responsibility for the international protection of refugees seems clear: fundamental rights and freedoms are normally secured for the individual by his or her Government. Since refugees do not enjoy the effective protection of their own Government, this normal remedy is unavailable, and it falls to the international community as a whole to provide the "international" protection necessary to secure to refugees the enjoyment of these rights.

B. The content of international protection

12. Given the broad scope of the overall objective of international protection, it is appropriate that the UNHCR Statute describes the protection function of the High Commissioner as encompassing virtually all the activities undertaken by her Office on behalf of refugees.[3] As outlined in general terms in the Statute of the Office and demonstrated in the practice of UNHCR, international protection involves seeking - in collaboration with Governments as well as non-governmental organizations (NGOs) - to meet the whole range of needs that result from the absence of national protection described in paragraph 10 above. International protection thus begins with securing admission, asylum, and respect for basic human rights, including the principle of non-refoulement, without which the safety and even survival of the refugee is in jeopardy; it ends only with the attainment of a durable solution, ideally through the restoration of protection by the refugee's own country. It includes promoting the conclusion and supervising the application of international conventions for the protection of refugees at the global and regional level,[4] promoting legislation and other measures at the national - and increasingly, regional - level to ensure that refugees are identified and accorded an appropriate status and standard of treatment in their countries of asylum, and ensuring, with and through the national authorities, the safety and well-being of specific refugee groups and individuals in asylum countries. Protection includes ensuring that the special needs of refugee women, particularly victims of violence, and of children, especially those separated from their families, are met. Since the ultimate goal of international protection must be to achieve a satisfactory solution for the refugee, the protection function also includes promoting with governments and with other United Nations and international bodies measures to remove or attenuate the causes of refugee flight so as to establish conditions that would permit refugees to return safely to their homes, and, when this becomes feasible, facilitating, assisting and monitoring the safety of voluntary repatriation. If safe return is not possible, it involves promoting and implementing the other durable solutions of resettlement or local integration.

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[3] UNHCR Statute, paragraph 8.

[4] See UNHCR Statute, para. 8(a); cf. 1951 Convention relating to the Status of Refugees, Article 35(1); and 1967 Protocol relating to the Status of Refugees, Article II(1).

13. Since sovereign States have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction[5], effective protection of refugees requires action by the Government of the country of asylum on their behalf. UNHCR's role in providing international protection consequently, and above all, involves ensuring that Governments take the necessary action to protect all refugees within their territory, as well as persons seeking admission at their borders who may be refugees. The fulfilment of the High Commissioner's international protection function requires the active cooperation and support of the Government concerned, and the support of the other countries of the international community.

C. The tools of international protection

14. The tools of international protection range from the legal and diplomatic to the material and practical, from international conventions to national legislation, to diplomatic démarches to secure asylum for individual refugees threatened with refoulement, to such concrete measures as arranging basic food rations, clean water, and even planting defensive thornbush hedges around refugee settlements. Presence in the field and unhindered access to refugees (including asylum-seekers whose refugee status has not been determined) by UNHCR and others responsible for their protection have proved to be "tools" of crucial importance which are an indispensible complement to protection activities in the legal and political domains. Practical protection in the field requires close working relationships with government officials at all levels, particularly those in direct contact with refugees. Since material assistance is often essential for refugees' survival, it can also be a sine qua non of international protection. Other tools of international protection include emergency resettlement to third countries - or assistance with return home - when refugees are at risk or otherwise unable to remain in their country of refuge; public information to promote understanding of the problems of refugees and thus generate support for generous refugee policies; information systems and networks to provide accurate and timely information on countries of origin, so as to ensure that persons in need of protection are correctly identified and to avoid misuse of asylum procedures; teaching and other promotion activities, to foster understanding of the problems and needs of refugees and of the principles of refugee law; training for refugee status determination officials, camp administrators, border guards, NGO staff and UNHCR personnel; counselling for individual refugees and asylum seekers; and the formulation and dissemination of guidelines for meeting the practical protection needs of specific categories of refugees, such as children and women; registration, documentation, family tracing and appropriate care arrangements for children separated from their families; and special programmes for women and other refugees who are victims of violence. The tools of protection may be utilized both by UNHCR and by national authorities responsible for refugees, as well as by NGOs, which in many countries play an accepted and valuable role in refugee protection.

15. Although the term "legal and political protection" clearly no longer suffices to convey the full scope of international protection, international legal

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[5] See International Covenant on Civil and Political Rights, Article 2 (1).

instruments, as well as internationally accepted principles and norms expressed, inter alia, in General Assembly resolutions, the Conclusions of the UNHCR Executive Committee, judicial decisions and scholarly opinion, are vital tools for the protection of refugees. The international system for the protection of refugees has as its central legal elements the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees. (The accession of Tajikistan and Dominica and the succession of The former Yugoslav Republic of Macedonia brings to 127 the number of States that are parties to one or both of these instruments.) These are the only universal instruments, and the clearest expression of international solidarity, for the protection of refugees. The provisions of the Convention remain the standard against which any measures for the protection and treatment of refugees are judged. Its most important provision, the principle of non-refoulement contained in Article 33, is the cornerstone of international protection. UNHCR plays a central role in this international framework, with responsibility under its Statute for promoting and supervising the application of international conventions for the protection of refugees, with the corresponding responsibility of States Parties, under Article 35 of the Convention and Article II(1) of the Protocol, to cooperate with the Office in the exercise of its functions.

16. The 1951 Convention and the 1967 Protocol are complemented by regional refugee instruments, notably the 1969 OAU Convention governing the specific aspects of refugee problems in Africa and, for Latin America, the 1984 Cartagena Declaration. The system has been further reinforced by a growing corpus of national law relating to the admission, recognition and protection of refugees. International and regional human rights instruments and international humanitarian law are invaluable additional legal tools of international protection.

17. As UNHCR increasingly finds itself called upon to provide protection and humanitarian assistance in or close to areas of armed conflict and in countries of origin, new challenges emerge which call for the development of new tools of protection. These include humanitarian diplomacy at both the national and local level, closer coordination with the political organs of the United Nations as well as regional organizations, closer working relationships with the military both in the context of peace-keeping or peacemaking operations, logistical support for humanitarian assistance, and the physical protection of refugees and displaced persons, and intensified cooperation with the International Committee of the Red Cross and with human rights monitoring teams. In conflict situations the 1949 Geneva Protocol relative to the Protection of Civilian Persons in Time of War and the Additional Protocols of 1977 assume particular importance among the legal tools available. Where the Office is involved in protection and assistance activities on behalf of people in their own countries, refugee law as such does not apply. National law and international human rights and humanitarian law are the basic legal tools of protection.

18. In countries of origin as in countries of asylum, laws can serve as guiding principles and as tools for protection, but to achieve their objective they must be respected and enforced. This requires that Governments have both the political will and the means to implement them. Where Governments lack the means to protect refugees or their own citizens, they need to receive the assistance of the international community to enable them to do so. In many of the most difficult situations now confronting UNHCR, the problem of enforcement of recognized legal

and humanitarian principles is critical. The removal of armed elements from refugee camps, the prevention of attacks, intimidation and harassment of refugees and returnees by outsiders and also by members of their own national or ethnic group, the clear separation of refugees from persons who do not qualify for or deserve international protection, and the implementation of humanitarian law are among the urgent tasks that must be accomplished to ensure the protection and welfare of refugees, as well as of local populations, and to facilitate the solution of voluntary repatriation. The fulfilment of the High Commissioner's international protection mandate in these situations requires cooperation with governments and other agencies and organs of the United Nations system and of the international community generally, acting under their own complementary mandates in the political and legal as well as the humanitarian spheres.

III. MEETING THE NEED FOR INTERNATIONAL PROTECTION: THE ADEQUACY OF THE AVAILABLE LEGAL TOOLS

19. One of the major issues faced by UNHCR in providing international protection is the question of the adequacy of the tools, particularly the legal tools, that are available to accomplish the task. To what extent are there gaps between the coverage of international instruments and the categories of people actually in need of international protection? To the extent that there are gaps, what should, and what can, be done to fill them?

A. The relevance and limitations of the 1951 Convention and the 1967 Protocol

20. Over the forty years since it entered into force, the 1951 Convention, complemented by the 1967 Protocol, has proved sufficiently flexible to afford international protection to refugees fleeing a wide variety of threats to their lives and fundamental rights in their countries of origin. These instruments continue to provide a firm legal basis for ensuring the protection of individual refugees escaping from oppressive regimes of every persuasion, as well as groups fleeing the turmoil that often accompanies changes, or attempted changes, in undemocratic systems of government. Indeed, in the post Cold War era, as internal conflicts involving oppression on ethnic and religious, as well as political grounds seem to become more frequent and generate major refugee flows, the continuing relevance of the grounds for refugee status contained in 1951 Convention definition is evident.

21. Despite the direct relevance of the 1951 Convention and the 1967 Protocol to many, perhaps most, contemporary refugee situations, the categories of persons whom States accept as "refugees" under these instruments, and their corresponding national legislation and jurisprudence, do not include all those who are acknowledged by the international community, and often by these same Governments, as requiring international protection because of the danger they face in their home country. The discrepancies between refugees recognized under the 1951 Convention and the wider group of persons in need of international protection arise in part from the way in which the definition of "refugee" in the 1951 Convention has been interpreted by some States, in part from the way the Convention together with the 1967 Protocol has been applied, and in part from limitations inherent in the instruments themselves. A further limitation to the effective coverage of the Refugee Convention and Protocol results from the fact that some States, including

some major countries of asylum, have not so far acceded to them, or continue to maintain the geographical limitation to refugees from Europe. The following paragraphs will examine the nature of these "gaps" within the effective reach of these key legal instruments, and what has or could be done to bridge them.

1. Varying interpretations of the refugee definition

22. Most States concur with UNHCR that the Convention and Protocol apply to refugees from civil wars who have good reason to fear being victimized because of their religion, ethnic origin, clan or imputed political opinion. Many States also agree that persecution within the meaning of the 1951 Convention may emanate not only from the Government but also from de facto authorities or from other groups in situations where the national Government is either unwilling or unable in practice to provide the persons concerned with protection that would enable them safely to remain within, or to return to, their country. In some countries, however, the competent authorities, including administrative or judicial tribunals, have interpreted the terms of the refugee definition - in particular the words "a well-founded fear of being persecuted" - as requiring either a threat of persecution by the legal Government or the deliberate denial of protection by that Government to the individual concerned. Some authorities contend, moreover, that persons fleeing armed conflict cannot qualify as refugees under the 1951 Convention unless they are "singled out" for treatment different from that awaiting other members of their community. As a result, refugees fleeing ethnic or religious persecution by de facto authorities controlling a part of their country of origin, in the midst of a civil war in which it is effectively impossible for them to find safety elsewhere in their country, have been rejected as refugees under the Convention and Protocol in certain countries. (However, once admitted, they are almost always authorized to remain temporarily for humanitarian reasons.) In neighbouring countries, other "war refugees" in identical circumstances have been accepted as 1951 Convention refugees.

23. Since this particular problem of disparities in protection coverage begins, in a sense, with the definition of "refugee" in the 1951 Convention itself, as well as with the very similar definition, adopted some months earlier, in the UNHCR Statute, it is useful at this point briefly to consider certain aspects of the drafting history of these instruments. It is clear from the travaux préparatoires that the basic refugee definition adopted was intended and understood by the drafters to cover all those who were currently in need of international protection. With respect to the Convention, which defines the responsibilities of individual States, the representatives of States participating in the drafting were however careful to limit the future legal obligations of their countries by including a date line (refugees had to be such "as a result of events occuring before 1 January 1951") and an optional geographical limitation (to refugees "as a result of events occuring in Europe"). No such limitation was placed on the mandate and competence of the High Commissioner, or thus on the responsibility of the United Nations as a whole, which also extended to refugees who might be forced to flee as a result of events occuring after 1 January 1951. Hence there was from the outset a disparity between the categories of persons to whom the High Commissioner was given the obligation to provide international protection on behalf of the United Nations, and the legal obligations accepted by the individual member States. This situation

prevailed formally until the adoption of the 1967 Protocol removing the date line, and until the withdrawal of the geographical limitation by the vast majority of States parties to the two instruments.

24. It is noteworthy that efforts to limit the future obligations of States Parties to the Refugee Convention towards persons in need of protection (a) were confined to the inclusion of the date line and the geographical limitation, (b) were based on concern about signing a "blank cheque" for unforeseeable numbers of future refugees, and (c) that this concern was finally put to rest, in the light of experience, with the adoption of the 1967 Protocol and the lifting by all but a few States of the geographical limitation. With regard to the basic definition of the refugee, it was assumed by the drafters of the Convention and of the UNHCR Statute, including those pressing for a generous and universal coverage of both present and future refugees (or of "unprotected persons", as one delegation proposed), and with virtually no recorded debate, that the concept of refugee status based on a well-founded fear of persecution was adequate to cover all those in need of international protection owing to a rupture with their country of origin. The definition was meant to distinguish persons who could not safely return to or obtain the protection of their country because of the political situation there - refugees - from others (including those stateless persons who were not also refugees) who did not require international protection. There is no indication of any intention to single out a special class of refugees as more deserving of protection than others. The "broad definition" adopted was understood to cover "all legitimate refugees".[6]

25. As has already been mentioned, the 1951 Convention is explicitly predicated on "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination" and the concern of the international community, assembled in the United Nations, "to assure refugees the widest possible exercise of these fundamental rights and freedoms". (Preamble, first and second paragraphs.) The Convention was conceived as a measure "to extend the scope of and the protection accorded by" previous international agreements concerning refugees (idem, third paragraph). The Conference of Plenipotentiaries convened by the General Assembly to complete the drafting of, and to sign the Convention expressed, moreover, "the hope that the Convention ... will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting in so far as possible to persons in their territory as refugees, and who would not be covered by the terms of the Convention," [i.e., because of the date line and the geographical limitation], "the treatment for which it provides." (Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommendation E.) It seems clear from the records of the drafting and from the historical context that the Convention's provisions were

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[6] See, for example, Minutes of the 327th Meeting, Economic and Social Council, Ninth Session, 8 August 1949, E/OR (IX), pp. 634-648; ECOSOC Resolution 248 B (IX) of 8 August 1949; and Summary Record of the second through sixth meetings of the Ad Hoc Committee on Statelessness and Other Problems, E/AC.32/SR.2-6; Memorandum of the Secretary-General [to the Fifth Plenary Session of the General Assembly], transmitting, inter alia, the definition of the term "refugee" from the draft Convention relating to the Status of Refugees), 22 September 1950, UN Doc. A/1385, para. 9. See also Holborn, op. cit., pp. 76-82.

intended to be given an interpretation consistent with the generous spirit in which they were conceived. For UNHCR, which participated in the drafting of the 1951 Convention as well as the 1967 Protocol, it has always been understood that the basic definition of refugee was meant to have an inclusive meaning, rather than a restrictive one, in accordance with the fundamental objective of providing international protection to all who need it.

2. The applicability of the 1951 Convention and the 1967 Protocol in situations of mass influx

26. One of the issues relating to the adequacy of the present legal tools to meet protection needs is the question of the suitability of the Convention and Protocol for dealing with situations of large-scale influx of refugees, particularly where the appropriate long-term solution is considered to be voluntary repatriation. There are at least three aspects to this question: whether the persons concerned are "refugees" as defined in the Convention; the possible burden on procedures for the determination of refugee status; and the appropriateness of the treatment provided for in the 1951 Convention when the expected durable solution is not integration but repatriation. The first question was partially addressed in the preceding paragraphs, and is further discussed in section B, below, on the protection of persons outside the effective scope of the 1951 Convention and the 1967 Protocol. The answers to the last two questions remain the subject of debate, but it would appear that any inadequacies of the 1951 Convention regime in such situations stem more from the way in which the Convention has been applied than from its actual provisions.

27. With respect to refugee status determination, there is nothing in the Convention's provisions to preclude positive group determination or determination on a prima facie basis, subject to subsequent review. A number of countries have resorted to group determination where the refugee status of the persons concerned seemed evident on objective grounds. When circumstances in the country of origin are such that any reasonable person from a particular group would fear persecution, the "subjective element" of the refugee definition (i.e., "fear") can be presumed. If group determination is not considered appropriate, the recent experience of several countries demonstrates that individual refugee status determination can be feasible, albeit at some expense, even in situations of large-scale influx. The numbers of individual asylum-seekers dealt with in recent years by the determination authorities of some of the major asylum countries, which are equivalent to a large-scale influx by almost any standards, also demonstrate this capacity.

28. The suitability of 1951 Convention standards of treatment in mass influx situations where it is anticipated that return home in safety will become feasible in the near future is a more complex issue. Apart from the matter of whether the persons concerned are considered to meet the refugee definition, the question arises whether the treatment for which the Convention provides will have the effect of discouraging their eventual repatriation. Although refugee status under the 1951 Convention is always provisional, in the sense that the Convention ceases to apply if the circumstances which gave rise to refugee status cease to exist (Art. 1 C (5) and (6)), many of the provisions in Chapters III, IV and V of the Convention, relating to employment, welfare and administative measures, clearly help to facilitate refugees' integration in their country of asylum. The generous

treatment accorded by many States, with the encouragement of UNHCR, to refugees recognized under the Convention is such that some of those States have expressed concern about extending these benefits to refugees in situations of large-scale influx lest they be deterred from from repatriating when this becomes feasible.

29. Upon close analysis, however, the Convention itself would not appear to exclude the possibility of reorienting programmes for refugees admitted on a temporary basis towards their eventual return when conditions permit, rather than towards full integration in the asylum country. The benefits provided under the various articles of the Convention have different levels of applicability depending on the nature of the refugee's sojourn or residence in the country: the most fundamental rights (Articles 3 and 33), and some others (see, e.g., Arts. 7(1),8,13) are extended to all refugees; other basic rights are applicable to any refugee present "within" the country (e.g. Arts. 2,4,20,22,27), even illegally (see Art. 31); other provisions apply to refugees "lawfully in" the country (Arts.18,26 and 32); while certain of the more generous benefits are to be accorded "to refugees lawfully staying [résidant régulièrement] in [the] territory" of the country concerned (Arts.15,17,19, 21,23,24 and 28; see also Arts.14,16(2) and 25). The drafting history shows that the English term "lawfully staying" is based on the French, and that a distinction was intended between basic rights accorded to all refugees and other rights and benefits accorded to those accepted as legal residents.[7] Although these gradations in treatment allowed by the Convention have not generally been explored, they would appear to be consistent with temporary protection, which would include admission, humane treatment and respect for basic rights, including non-refoulement, but would not give refugees whose stay was expected to be of short duration the full range of integration-oriented benefits accorded to those for whom asylum was also seen as the durable solution. Temporary protection is discussed in detail in Part IV B.

B. Legal aspects of the international protection of refugees who are not covered by the 1951 Convention and the 1967 Protocol

30. The lack of a complete correspondence between the categories of persons covered by the 1951 Convention and the 1967 Protocol and the broader class of persons in need of international protection is not simply a matter of a broad or narrow interpretation of the elements of the refugee definition, nor of the difficulty of applying the 1951 Convention in situations of large-scale influx. However liberally its terms are applied, some refugees fleeing the civil wars and other forms of armed conflict that are the most frequent immediate causes of refugee flight fall outside the letter of the Convention. Although many refugees from armed conflict do have reason to fear some form of persecution on ethnic, religious, social or political grounds at the hands of one or more of the parties to a conflict, others typically are fleeing the indiscriminate effects of armed conflict and the accompanying disorder, including the destruction of homes, harvests, food stocks and the means of subsistence, with no specific element of "persecution". While it is clear that such victims of conflict require

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[7] See Goodwin-Gill, G.S., The Refugee in International Law (Oxford, 1983), pp. 160-162. See also Grahl-Mahdsen, The Status of Refugees in International Law (Leyden, 1966), pp.350-355.

international protection, including asylum on at least a temporary basis, they clearly do not fit within the literal terms of the 1951 Convention refugee definition as it has been generally applied for the past forty years. States and UNHCR, recognizing that such refugees from armed conflict are also in need, and deserving, of international protection and humanitarian assistance, have adopted a variety of solutions to ensure that they receive both. Efforts to bridge the gap between the need for international protection and the principal international instruments available to provide it have involved a broadened UNHCR mandate combined with reliance on regional instruments, other international instruments, customary international law, and ad hoc arrangements relying on the humanitarian policies of Governments.

1. The broadening of the High Commissioner's competence

31. With respect to the mandate of UNHCR, successive General Assembly resolutions have had the effect of extending the High Commissioner's competence to refugees fleeing armed conflict. Using a variety of formulations, the General Assembly has regularly called upon the High Commissioner "to continue his assistance and protection activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called upon to assist in accordance with relevant resolutions of the General Assembly".[8] In accordance with these resolutions, and with the strong support of the Executive Committee and of the international community as a whole, it has been the regular and consistent policy and practice of UNHCR to provide international protection, mobilize humanitarian assistance and seek solutions for refugees from armed conflicts as well as those fleeing persecution.

32. It will be seen that the terminology employed for refugees who may not come within the terms of the 1951 Convention definition (and that in the UNHCR Statute) in neither consistent nor clear. The term "displaced persons" has been used ambiguously for people displaced within and outside their country of origin; "persons of concern" connotes nothing of the plight of refugees, and could refer to non-refugees of concern to the Office, such as returnees, asylum-seekers generally (because they *may* be refugees), and persons within their own country to whom the Office is requested to extend protection and assistance. In order to avoid these ambiguities and to convey clearly to the lay person the reality of coerced flight from one's country, the Office has in recent years adopted the usage of regional instruments such as the OAU Refugee Convention and the Cartagena Declaration, using the term "refugee" in the broader sense, to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder.

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[8] GA res. 3143 (XXVIII), 14 Dec.1973. Other resolutions refer, e.g., to "refugees for whom [the High Commissioner] lends his good offices" (GA Res.1673 (XVI), 18 Dec. 1961; "refugees who are of [the High Commissioner's] concern" (GA res. 2294 (XXII), 11 Dec 1967; "refugees and displaced persons, victims of man-made disasters" (ECOSOC Res. 2011(LXI), 2 Aug.1976, endorsed by GA res. 31/55 of 30 Nov. 1976; "refugees and displaced persons of concern to the Office of the High Commissioner" (GA res.36/125, 14 Dec.1981); "refugees and externally displaced persons" (GA res. 44/150, 15 Dec. 1988; "refugees and other persons to whom the High Commissioner's Office is called upon to provide assistance and protection" (GA res. 48/118, 20 Dec.1993).

2. Regional refugee instruments

33. In Africa, the need for an expanded refugee definition became apparent soon after the adoption of the 1951 Convention, in connection with persons who became refugees as a result of the process of decolonization, the struggle for national liberation and the creation of new States. The 1 January 1951 date line reduced the usefulness of the 1951 Convention in this context (until the adoption of the 1967 Protocol), and the reference to a well-founded fear of persecution, which was thought to imply individual determination of refugee status, was difficult to apply owing to the cost of individual procedures as well as the absence of established administrative mechanisms for this purpose. The 1951 Convention definition also seemed inappropriate in connection with large-scale movements of refugees from armed conflict, where subjective individual motivations appeared less relevant than the immediate objective need for assistance and protection. The willingness of neighbouring States to provide asylum was normally not at issue, and assistance and protection were provided, with UNHCR operating under its "good offices" concept, until the adoption in 1969 of the OAU Convention relative to the Specific Aspects of Refugee Problems in Africa.

34. The 1969 OAU Refugee Convention adopted a two-part definition of refugee, including the 1951 Convention/UNHCR Statute definition as the first part and adding:

> The term refugee shall apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The United Nations General Assembly has endorsed the recommendations adopted by the Arusha Conference on the Situation of Refugees in Africa, which recognized the OAU definitions as the basis for determining refugee status in Africa and recommended that "the 1969 OAU Refugee Convention, the regional complement in Africa of the 1951 Convention..., be applied by the United Nations and all its organs as well as by non-governmental organizations dealing with refugee problems in Africa... ."[9]

35. The OAU Refugee Convention, which was adopted 25 years ago and has now been in force for 20 years, in many respects provides a model for the provision of international protection to all refugees, whether they are fleeing armed conflict, civil strife, persecution, or, as is often the case, a combination of these. The use of objective criteria facilitates the recognition of refugee status on a prima facie basis in the case of large refugee flows, a practice that is not inconsistent in theory with the 1951 Convention, but which is at variance with the highly individualized manner in which the latter instrument has normally been applied by States Parties. Such criteria also avoid the potential inter-State frictions that

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[9] GA res. 34/61 on the Situation of Refugees in Africa (29 Nov. 1979), para. 1. Recommendations from the Pan-African Conference on the Situation of Refugees in Africa, Arusha, Tanzania, 7-17 May 1979, Recommendations 2(1) and 7(5). (UNHCR, 1984)

result from the perception that recognition of refugee status under the 1951 Convention implies criticism of the authorities of the country of origin.

36. In Latin America, the American Convention on Human Rights, the "Pact of San José, Costa Rica", to which 24 Latin American and Caribbean States are parties, contains a provision against refoulement which, besides covering refugees under the 1951 Convention and the 1967 Protocol, could apply in certain situations to persons not covered by these instruments. Closer in scope to the OAU Refugee Convention, however, is the Cartagena Declaration, which was adopted by a group of experts and representatives from Governments at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama held in Cartagena, Colombia, on 19-22 November 1984. Building on the precedent provided by the OAU Convention and on the work of the Inter-American Commission on Human Rights, the Declaration recommends the use in the region of a "definition or concept of refugee ... which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." Although the Declaration itself is not a binding legal instrument, it has repeatedly been endorsed by the General Assembly of the Organization of American States (OAS), which has called upon OAS member States to implement its provisions with respect to refugees on their territories.[10] The Cartagena Declaration, the tenth anniversary of which is being commemorated this year, has come to be accepted as providing the conceptual framework for refugee protection policy not only in Central America but in Latin America generally and has been incorporated into the national legislation of several Latin American States.

37. Unlike the 1951 Convention, the OAU Refugee Convention and the Cartagena Declaration both refer explicitly to voluntary repatriation. The OAU Convention provides that "[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will." (Art. V) It also spells out in some detail the conditions and mechanisms of repatriation. The Cartagena Declaration "reiterates the voluntary and individual character of repatriation and the need for it to take place in conditions of complete safety, preferably to the refugee's place of residence in the country of origin." (Conclusion Twelve)

3. International protection where international refugee instruments do not apply

38. Another important category of refugees who do not benefit from the formal protection of Convention and Protocol consists of those who seek refuge in countries that are not parties to those instruments, or have maintained the geographical limitation. In certain regions, particularly in West, South and South-East Asia, as well as in a few countries in the Americas, States have provided asylum at least on a temporary basis to large numbers of refugees, often

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[10] See OAS General Assembly, XV Regular Session (1985), Resolution approved by the General Commission at its fifth session held on 7 December 1985.

for more than a decade, without becoming parties to any of the relevant international instruments. Most of the countries concerned have repeatedly both reaffirmed and demonstrated their support for basic protection principles, especially the principle of non-refoulement, recognizing at least implicitly its normative character. Most of these States recognize and welcome the High Commissioner's international protection role and have cooperated fully with UNHCR. In view of the very generous asylum policies of several of these countries it would appear difficult to defend as a general rule that action consistent with international protection principles is more likely in a country that is a party to the Refugee Convention and Protocol than in one that is not. There is however a tendency, in States that are not parties to any international refugee instrument, for refugees from certain countries to be accepted on a prima facie basis, while others are, at best, merely tolerated at the request of UNHCR, based on recognition by the Office under its mandate. Moreover the inapplicability of any binding international instrument means that the protection of refugees is dependent on the policy and goodwill of particular Governments, with the attendant uncertainty and the risk of a changed policy if a new Government has less respect for the High Commissioner's international protection function and for international norms for the protection of refugees. UNHCR accordingly continues to encourage the States concerned to accede to the 1951 Convention and the 1967 Protocol and to consider the usefulness of regional refugee instruments for promoting coordinated regional approaches to refugee problems on the basis of international cooperation and burden-sharing.

4. Ensuring international protection for all who need it in other regions

39. In European and other Western countries, no international regional instruments exist specifically for the protection of refugees from conflict who do not otherwise come within the terms of the 1951 Convention and the 1967 Protocol. It is nonetheless the practice of the great majority of these States to offer some form of protection to persons whose life or freedom would be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin. Although they are not usually deemed to qualify as "refugees", or formally granted asylum within the terms of national legislation, a kind of provisional asylum is in fact granted through a wide variety of legislative, judicial and administrative measures. These have included such arrangements as "extended voluntary departure" and "temporary protected status" in one country, the "designated class" in another, and in others the so-called "B-status" for persons not recognized as refugees under legislation based upon the 1951 Convention but for whom compelling humanitarian reasons militate against return to the country of origin, "temporary leave to remain", residence permits granted on compassionate grounds or, at the very minimum, "tolerance" or temporary suspension of deportation. Several States have enacted, and a few are considering, special legislation pertaining to refugees fleeing armed conflict or instituting the practice of "temporary protection".

40. The need to provide international protection to persons fleeing armed conflict and civil strife, whether or not they come within the terms of the 1951 Convention definition, is generally accepted in practice by States as a humanitarian responsibility. The protection accorded in these countries to persons who are not deemed to be refugees under the 1951 Convention is normally granted as

a sovereign humanitarian act, or as a duty under national law (including constitutional provisions), without reference to international legal obligations. It should be noted however that many of these countries are parties to other international instruments that could be invoked in certain circumstances against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would in jeopardy. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, to which 82 States are parties, provides (in Art. 3) that "No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights as implicitly prohibiting the return of anyone to a place where they would face a "real and substantiated" risk of ill-treatment in breach of the prohibition in Article 3 of torture or inhuman or degrading treatment or punishment. Although these instruments do not provide protection against refoulement as broad as that provided in Africa by the OAU Refugee Convention, they do give rise to international obligations towards some persons in need of international protection who would not come within the terms of the 1951 Convention.

41. While the practice of granting temporary refuge, or asylum on a temporary basis, to refugees has often been employed in situations of large-scale influx in various regions, UNHCR first formally recommended the granting of "temporary protection" to persons fleeing the conflict and human rights abuses in the former Yugoslavia. In that context, temporary protection has provided a framework for concerted action by the international community, using a variety approaches depending on each country's legislation and administrative system, to extend international protection to persons who clearly needed it, without initially examining whether they qualified as "refugees" under applicable international instruments - the 1951 Convention and the 1967 Protocol - or under national laws. Subsequently several countries have introduced or adapted some of the elements of temporary protection in connection with refugees from other regions. Since the basic elements of temporary protection may show the way to providing international protection in situations where the 1951 Convention and the 1967 Protocol do not fully meet the need, they are discussed in detail in Part IV.

5. Gaps in the present international protection system for refugees

42. Efforts to bridge the gap between the need for international protection of refugees and the legal tools available to provide it, including regional instruments, customary international law, and ad hoc arrangements relying on the humanitarian policies of most Governments, have in practice yielded considerable success. The OAU Refugee Convention, in particular, has placed the international protection of refugees, in the broad sense, on a firm legal footing in Africa. Despite its non-binding character, the Cartagena Declaration has contributed to the development and acceptance of customary regional norms for the protection of refugees fleeing conflicts in Latin America. Where there is no international legal framework for refugee protection, however, or where the existing framework does not include all those needing protection, asylum and protection depend on the continuing goodwill of Governments. Despite the generosity shown by most countries, such goodwill is not necessarily permanent or stable, and can be unduly swayed by the vagaries of public opinion. Moreover, protection based on the

complete discretion of Governments is often inconsistent; while millions of refugees from armed conflicts and civil disorders benefit from temporary asylum accorded ex gratia, many others are denied protection, often because of political or foreign policy considerations relating to their country of origin.

43. A gap in the protection available to refugees who are outside the framework of the 1951 Convention and the 1967 Protocol, and in regions where neither the OAU Convention nor the Cartagena Declaration are applicable, involves States' decisions to formally accord temporary refuge only to persons who were already in the country of refuge before a certain date, with no provision for admission of others fleeing the same situation after that date (although deportation may be suspended for new arrivals who actually manage to enter the country). In addition, measures adopted by States, particularly under multilateral or regional agreements, to cope with large numbers of asylum applications, including accelerated and "manifestly unfounded claim" procedures and sending applicants to "safe third country", often do not include safeguards applicable to refugees from armed conflict who do not also have a "well-founded fear of persecution" under the 1951 Convention. For example, some countries will return an asylum-seeker to a "first country of asylum" if they are satisfied that he or she will have access there to fair procedures for the determination of refugee status under the 1951 Convention. No inquiry is made whether a refugee from armed conflict, who does not also fear persecution, would be granted protection in that country. In order to ensure access to safety for all who need international protection, it is crucial that the safeguards that are attached to these and other measures, such as visa regulations, carrier sanctions and pre-departure checks, or to the issuance of visas in countries of origin, make due provision for people who are forced to flee their countries because of threats to life, liberty and personal security other than "persecution".

IV. BRIDGING THE GAPS IN INTERNATIONAL PROTECTION: HOW CAN INTERNATIONAL PROTECTION BE ENSURED FOR ALL WHO NEED IT?

A. Possible approaches

44. The international community, through the United Nations General Assembly and the Executive Committee, regularly calls upon the High Commissioner to extend protection and assistance to refugees from armed conflict and other "man-made disasters" as well as to those within the terms of the Statute of the Office. One of the critical challenges facing UNHCR is to find ways to guarantee effective international protection for all those who require it, whether or not they are within the scope of the treaty obligations of individual Governments. While regional legal instruments may appear to show the way, hopes of widening the scope of international instruments to cover refugees beyond those provided for in the 1951 Convention and the 1967 Protocol are confronted with the reluctance of many States to undertake internationally binding legal obligations towards refugees beyond those that they have already assumed. Besides the possibility of global or regional conventions for the protection of refugees in the broader sense, other options include an approach similar to the Cartagena Declaration but on a global basis, i.e. a declaration of guiding principles for international protection; similar regional declarations; regional harmonization processes recommending and leading to the adoption of parallel national legislation; coordinated, but ad hoc, international responses to specific refugee situations; or a more comprehensive,

global, but still not mutually binding approach. UNHCR believes that the concept of temporary protection should be a feature of whatever approach is adopted.

B. Temporary protection as a pragmatic tool for meeting the need for international protection of refugees, including those outside the scope of the 1951 Convention

45. UNHCR considers that the pragmatic approach adopted by the international community, in cooperation with UNHCR, in providing temporary protection to victims of the conflict and systematic human rights abuses in the former Yugoslavia, whether or not they were refugees under the 1951 Convention, brings together a number of elements that deserve consideration in connection with efforts to meet global protection needs. The aspects of temporary protection that may be relevant to meeting the need for international protection in a broader context include:

(i) its use as a tool to meet protection needs in mass outflows;

(ii) the definition of beneficiaries on the basis of the need for international protection;

(iii) the description of the basic elements of protection;

(iv) the focus on return as the most appropriate solution; and

(v) the provision of international protection as part of a comprehensive programme of concerted international action that includes prevention and solutions.

Each of these aspects is discussed in turn in the following paragraphs.

46. Meeting urgent protection needs in mass refugee flows: Temporary protection has served as a means, in situations of mass outflow, for providing refuge to groups or categories of persons recognized to be in need of international protection, without recourse, at least initially, to individual refugee status determination. It includes respect for basic human rights but, since it is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights and benefits are offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol. In many respects it is a variation of the admission and temporary refuge based on prima facie or group determinations of the need for international protection that have been used frequently to deal with mass flows of refugees in other parts of the world. These have been the subject of discussions in the UNHCR Executive Committee Sub-Committee of the Whole on International Protection on the basis, inter alia, of the report of a Group of Experts on temporary refuge in situations of large-scale influx, which led to the adoption by the Executive Committee in 1981 of Conclusion No. 22 (XXXII) on the protection of asylum-seekers in such situations. In the situation in the former Yugoslavia, the value of temporary protection in affording protection to those who needed it without overburdening individual eligibility procedures appears to have been demonstrated, although several States subsequently proceeded to conduct individual determination.

47. The definition of beneficiaries on the basis of the need for international protection: With respect to refugees fleeing the conflict and human rights abuses in the former Yugoslavia, temporary protection was recommended for:

- persons who had fled from areas affected by conflict and violence;

- persons who had been or would be exposed to human rights abuses, including those belonging to groups compelled to leave their homes by campaigns of ethnic or religious persecution; and

- persons who for other reasons specific to their personal situation are presumed to be in need of protection.

In practice, the beneficiaries of temporary protection as so described would be the same as those covered in other regions by the OAU Refugee Convention or the Cartagena Declaration, and refugees granted asylum on a temporary basis in other regions without the benefit of any international legal instrument. States providing temporary protection have acted on the basis of a broad consensus on the need for international protection, without initially addressing the issue of whether those concerned were or were not refugees as defined in the 1951 Convention or any other legal instrument. Beneficiaries of temporary protection have in fact included both persons who clearly qualified as refugees under the Convention and others who might not.

48. The basic elements of temporary protection: The basic elements and standards of treatment agreed upon for the refugees benefiting from temporary protection approximate the minimum protection required by anyone in need of international protection. These include:

- admission to safety in the country of refuge;

- respect for basic human rights, with treatment in accordance with internationally recognized humanitarian standards such as those outlined in Conclusion 22 (XXXII) of the Executive Committee;

- protection against refoulement;

- repatriation when conditions in the country of origin allow.

49. The appropriate standards of treatment for refugees benefiting from temporary protection has been the subject of extensive discussion in the context of persons fleeing the conflict and human rights abuses in the former Yugoslavia. There was general agreement on the need for progressive improvements in standards beyond the minimum in Conclusion 22 (XXXII) when the period of temporary protection is prolonged. The actual levels of treatment depend on the reception capacity, the prevailing system of social benefits and the economic situation of the asylum country. Some national authorities contend that employment, educational opportunities and a certain measure of economic and social integration in the country of asylum are important for refugees' well-being, including their psychological and physical health, even when eventual voluntary repatriation is the expected long term solution. Since it is often impossible to predict with certainty when or even whether safe return will be possible, measures of partial

integration may also benefit the asylum country in the event that the refugees do become permanent residents. In accordance with the principle of non-discrimination, any substantial differences in the standards of treatment of different groups of refugees should be related to genuine differences in their situation, such as, for example, the reasonable expectation that the stay of a particular group in the country of refuge was expected to be of short duration.

50. Focus on return as the most appropriate solution: One of the principal reasons for applying the term "temporary" to protection given to persons fleeing conflicts or acute crises in their country of origin is the expectation - or at least the hope - that international efforts to resolve the crisis will, within a fairly short period, produce results that will enable the refugees to exercise their right to return home in safety. This focus on return as the most likely and appropriate solution to a particular refugee situation also provides the rationale for standards of treatment which emphasize the provisional aspect of the refugees' stay in the country of asylum, and minimize, at least in the initial stages, efforts to promote integration, which have traditionally been central to refugee reception policies in the countries concerned. Asylum is provided as a measure of protection, rather than as a durable solution. As the situation in Bosnia and Herzegovina shows, hopes for an early safe return are not always realized, and at a certain point the refugees' need for stability and greater certainty may call for standards of treatment more appropriate for a prolonged stay, and even eventual conversion to a more definitive status. (It has in fact been observed that the point at which countries of asylum find it necessary to regularize the situation of refugees admitted temporarily is often reached sooner than a resolution of the crisis that would permit safe return.) Up to, and even after, that point, temporary protection arrangements offer a means of ensuring protection for so long as it is needed while continuing to favour repatriation as the preferred solution. This focus on return must also include preparations and practical arrangements for repatriation, reintegration and rehabilitation in the country of origin when and if conditions permit. Temporary protection, like refugee status, should last as long as there remains a need for international protection (or until conversion to a more permanent status). If conditions in the country of origin change sufficiently for the better to make possible the refugees' return in safety and dignity, arrangements can be made, in consultation with UNHCR, for temporary protection to be phased out, ideally through voluntary repatriation.

51. Temporary protection as an element of a comprehensive approach: Temporary protection should be one component in a comprehensive approach, involving concerted efforts on the part of the international community to achieve a solution to the conflict that will enable those who have fled to return home in safety and dignity. It also implies burden sharing and international solidarity, including assistance, where required, to the countries most directly affected. In the case of the former Yugoslavia this has also included reception of refugees, particularly the most vulnerable, outside the immediately affected region. Temporary protection would make little sense as a strategy if it were divorced from efforts to address the causes and to attain solutions to the refugee problem. In this respect temporary protection represents one of the variable approaches to asylum that the High Commissioner has adopted as part of comprehensive approaches in other regions. While each such plan must be different, given the uniqueness of each situation, the notion that asylum may be granted initially on a temporary basis, while efforts to achieve a solution are pursued, has been a common feature. In any such

comprehensive approach, the coordination and leadership of UNHCR with respect to the refugee aspects, and the cooperation and support of countries of origin, countries of asylum and of the international community as a whole, are essential.

C. Consideration of the possible approaches

52. A new Convention: From the perspective of ensuring the international protection of those who require it, the option of an international instrument of global scope to complement the 1951 Convention and the 1967 Protocol, an OAU refugee Convention writ large, is most attractive. The argument in favour of ensuring protection through a binding international instrument was aptly presented by a delegate to the Ad hoc Committee convened in 1950 to draft a refugee convention:

> [I]f reliance were to be placed entirely on the good will of States, there would be no need for a convention. [However], should the good will be lacking in any one instance, the refugees concerned would have no legal rights they could press. It was for the committee to draft a convention endowing them with such rights; States could then demonstrate their good will by accepting the convention and observing its provisions."

53. However desirable new international instruments might be for the protection of such refugees, there seems to be little inclination on the part of States, despite their generous asylum practices, to incur further legal obligations in this domain. The large numbers of refugees granted asylum and of applicants for refugee status, and the burden that unfounded claims place on asylum procedures and reception facilities, as well as public apprehension of uncontrolled migration, undoubtedly contibute to this reluctance.

54. A declaration of guiding principles: If a new Convention seems for the present to be out of the question, an international declaration, or regional declarations, along the lines of the Cartagena Declaration would appear to be not only desirable but perhaps even a feasible option. Indeed, the many General Assembly resolutions and Executive Committee Conclusions that call upon the High Commissioner to continue to provide protection and assistance to persons of her concern have already demonstrated the broad consensus of the international community that refugees from armed conflict should receive international protection. An international declaration to this effect, calling upon all States to cooperate in extending such protection, would formalize this commitment and provide the High Commissioner with an additional basis for eliciting such cooperation. Like the Cartagena Declaration, an international declaration including guiding principles of international protection (including the need to provide protection on at least a temporary basis until a solution to the refugee problem was achieved) could in the best cases provide an inspiration for national legislation. While the global, trans-regional character of many contemporary refugee problems means that a statement of principles should be global in scope, the possibility of complementary regional declarations could also be considered.

" Summary record of remarks made by Mr. Louis Henkin, delegate of the United States of America, at the second meeting of the Ad Hoc Committee on Statelessness and Related Problems on 17 January 1950, E/AC.32/SR.2, page 9.

55. Regional harmonization: Harmonized regional approaches, of which the European Union offers the strongest example, are perhaps the most promising option for strengthening protection. As progress is made towards removing intra-regional barriers on the movement of persons and coordinating regional policies on the admission - and non-admission - of foreigners, including asylum-seekers, it is inevitable that national policies concerning the admission of persons in need of international protection should also be harmonized. To the extent that the recommendations of regional bodies lead to the adoption of national legislation in conformity with them, the practical effect can be virtually the same as a regional convention.

56. Concerted approaches in specific situations: The international response to the crisis in the former Yugoslavia and the earlier resonse to problems of refugees from Indo-China, which culminated eventually in the CPA, are two examples of concerted action by the international community, coordinated by UNHCR, which included measures to ensure that persons in need of international protection received it. Such major ad hoc efforts have been extremely effective in mobilizing international support on behalf of specific groups of refugees. Their effectiveness has depended in large measure, however, on the dramatic nature and the high public awareness of the specific crises, including sustained media attention. They do not by themselves provide a reliable model for ensuring the protection of refugees fleeing less accessible conflicts. However the experience in particular regions of such coordinated international cooperation with UNHCR to provide protection to persons who need it, on the basis of a humanitarian consensus, could provide the basis for the development of procedures and mechanisms for a more systematic concertation of action to meet urgent international protection needs identified by UNHCR. The periodic meetings of government experts on temporary protection for refugees from the former Yugoslavia and the Steering Committee of the CPA are examples of such mechanisms. It should be noted that the mechanisms of cooperation accepted by Governments have thus far been informal and consensual. While Governments have welcomed the guidance of UNHCR concerning the need of particular groups for international protection, beginning with asylum, the suggestions of some States receiving large numbers of refugees for systematic "burden-sharing", involving the establishment of quotas for a fair repatriation of asylum-seekers or refugees, have had a very cool reception from other less directly-affected countries.

57. Given broad consensus on the need to provide protection, including asylum on at least a temporary basis, to refugees forced to flee war or serious civil disorders as well as to those fleeing persecution, but the reluctance of Governments to enter into mutually binding agreements, the adoption of guiding principles embodied in a global or regional declaration, together with a systematic recourse to concerted arrangements coordinated by UNHCR, could be the most realistic option. The High Commissioner would welcome the advice of the members of the Executive Committee as to how the objective of ensuring that all who need international protection receive it may best be achieved.

V. THE NEED FOR PROTECTION IN COUNTRIES OF ORIGIN

58. Not all the victims of conflicts or human rights abuses in their home countries seek, or reach, safety in another country and become refugees. The same

failure of protection which precipitates refugee flows often causes displacement within national borders; and, besides those who are displaced, wars, civil disorders and the threat of persecution also affect many people who remain in or near their homes. From the standpoint of the international protection of refugees, finding remedies for the lack of protection in countries of origin is essential to achieve the preferred solution of voluntary repatriation, and also to prevent future refugee flows.

59. Since refugees have crossed an international border and do not enjoy the protection of their own Government, it is natural that the international community should concern itself with their welfare, and that Governments of the countries receiving them should solicit and welcome such concern. With respect to persons in need of protection and assistance who remain within their own national boundaries, however, considerations of national sovereignty may take precedence over humanitarian concerns. It is of course the responsibility of each State to respect and ensure the rights of everyone within its territory and subject to its jurisdiction, and unsolicited international involvement in assisting and protecting people in their own country may be be viewed as an infringement on the prerogatives of the State. This position is however qualified by the increasing acceptance by States of the legitimate concern of the international community for human rights, and by the fact that State sovereignty must be accompanied by the appropriate exercise of State responsibility. This includes the duty under international humanitarian law to afford access to essential humanitarian assistance for those who need it.

60. UNHCR's efforts to promote solutions and to contribute to the prevention of refugee problems include support for measures in countries of origin contributing to respect for human rights and the peaceful resolution of conflicts that have or may give rise to refugee flows. However, the Office's direct involvement and concern with the protection of nationals in their own countries relates primarily to four categories: repatriating refugees, the internally displaced, persons threatened with displacement or otherwise at risk, and stateless persons.

61. International protection in voluntary repatriation: The promotion and facilitation of voluntary repatriation are among the responsibilities of the High Commissioner listed in the Statute of the Office, and have from its inception been key activities of UNHCR. The Executive Committee, in a Conclusion endorsed by the General Assembly, has recognized

> [t]he High Commissioner as having a legitimate concern with the consequences of return, particularly where such return has been brought about as a result of an amnesty or other form of guarantee. The High Commissioner must be regarded as entitled to insist on his legitimate concern over the outcome of any return that he has assisted. Within the framework of close consultations with the State concerned, he should be given direct and unhindered access to

returnees so that he is in a position to monitor fulfilment of the amnesties, guarantees or assurances on the basis of which the refugees have returned. This should be considered as inherent in his mandate. [12]

62. This Conclusion reflects what has become the Office's standard practice of actively monitoring, with the full agreement of the States concerned, the situation of returnees in their country of origin, in addition to promoting, facilitating and coordinating their voluntary repatriation. In most cases such monitoring, as well as support for rehabilitation and reintegration programmes, is explicitly provided for in tripartite or bilateral agreements between UNHCR and the States concerned. In the best circumstances, the monitoring aspect of UNHCR's presence in the country of origin of repatriating refugees results in simply confirming to other potential repatriants and to the international community the safety and well-being of those who have already returned. Where refugees voluntarily return home to unstable or insecure conditions, however, the Office's role includes interceding with the authorities and other relevant parties at the local and national levels to ensure the safety of returnees and enforcement of their basic rights. In several countries of repatriation UNHCR is currently working in close cooperation with the Government and returnee leaders to help re-establish or strengthen effective national protection and build confidence so as to permit further repatriation.

63. The promotion, facilitation and monitoring of voluntary repatriation calls for a different set of protection tools, both legal and non-legal, than protection in countries of asylum. Several current situations present enormous challenges that will require new approaches and strategies quite different from those that have been applied traditionally, for example when a country achieved independance or returned to democracy. When countries have been riven by ethnic strife and civil war - particularly when these have included genocide, war crimes and crimes against humanity - the process of reconciliation, if indeed possible, can be expected to be long and arduous. Formal amnesties or guarantees will be of little value to the returning refugee if they are not accompanied by the political will at every level to give them effect, and if they do not represent a genuine commitment by the people themselves to live together in peace. For such a commitment to be made and maintained, each of the different groups and communities that compose a "national community" must themselves be, and feel, secure in the enjoyment of their own rights and freedoms. This is a political and social challenge that extends far beyond the resolution of a refugee problem and in some cases affects the continuing viability of the national entity itself. It is accompanied by an urgent need to reconstruct devastated infrastructure and to re-establish political, administrative and social institutions. UNHCR's role in promoting and facilitating voluntary repatriation in these circumstances is one component of a multi-sectoral process that will require the mobilization of support and resources on a vast scale from many parts of the international community.

64. Protection of the internally displaced and local population at risk: Activities of the kind described in the preceding paragraphs are closely linked with - indeed are often the same as - UNHCR's activities on behalf of the

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[12] Executive Committee Conclusion No.40(XXXVI)(1985), para. (1). See GA res. 40/118 (13 Dec.1985), para. 7.

internally displaced and other persons in vulnerable situations in their own country. The protection aspects of UNHCR's activities on behalf of internally displaced persons are discussed in a note submitted by the Office to the present session of the Executive Committee (EC/SCP/87), as well as in last year's Note on International Protection (A/AC.96/815, pp.16-21). While the situation of the internally displaced is closely analogous to that of refugees, differing in that the former have not crossed an international border, a review of UNHCR's past and current operational activities with internally displaced shows that in most cases it is neither possible nor desirable, when providing assistance or protection to persons in their own country, to make distinctions between the displaced and other affected persons in the same area, except on the basis of actual need. In areas of ongoing conflict or systematic abuses of human rights, for example, the besieged or threatened local population may be in as much or greater need of protection and assistance than those who have been displaced, or than returnees or refugees. Where the displacement has been into areas where effective protection is provided by the local authorities, the displaced may in fact be more secure than those who have stayed behind. In many other situations, as the analytical report of the Secretary- General has pointed out,[13] displacement itself entails extreme vulnerability and leads to further abuses of fundamental rights. The conclusion to be drawn is that coerced displacement, whether within or across national borders, should be seen as the consequence and symptom of a broader problem involving the absence or failure of national protection, a problem which should if possible be addressed globally rather than piecemeal. Where UNHCR is called upon to provide assistance and protection to groups in their own country, whether they be repatriating refugees, internally displaced, "returnees" from displacement, or persons at risk in the local population, it accordingly seeks to respond to the relevant needs of <u>all</u> members of the community, making distinctions, where appropriate, on the basis of actual need rather than status.

65. <u>Protection in countries of origin</u>: UNHCR performs protection functions on behalf of persons in their own country in several different types of situation. In the traditional and still very common type of situation, such as in the repatriation of refugees to relatively peaceful and stable conditions, the role of the Office and of other international agencies is primarily to support efforts by the Government to ensure protection to its nationals. While providing such support is clearly an aspect of the High Commissioner's international protection functions, it is perhaps appropriate to call it "international support for national protection". Other types of situation include those where the Government is unable to ensure protection because it does not have control over a portion of its own territory; situations where central government authority has disappeared; where the Government or de facto authority is itself either unwilling to protect or actively oppressing individuals within its territory but nonetheless is persuaded to accept the presence of international monitors; and situations of transition between regimes, extreme instability or active conflict where the international community is either called upon by the recognized Government or is authorized to act by the competent organ of the United Nations to provide humanitarian assistance and some form of protection. In the last type of situation, a variety of more direct

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[13] Analytical Report of the Secretary-General on Internally displaced Persons, E/CN.4/1992/23, para. 6 and passim. See also Note by the Secretary-General, E/CN.4/1992/35, Annex, para 30.

protection functions performed by agencies such as UNHCR, ICRC, United Nations human rights mechanisms and, increasingly, United Nations and regional peace-keeping operations, may be considered a kind of "international" protection, although the term is used in a somewhat different sense than in the UNHCR Statute. The "international protection" that can be extended by a humanitarian organization such as UNHCR is obviously not a substitute for the concrete protection and security that should and must be provided by a Government discharging its responsibility to respect and ensure the fundamental human rights, including the rights to life, liberty and security of person, of all individuals in its territory.

66. Stateless persons are another category who do not enjoy full national protection. Since their basic human rights are in principle respected in their country of habitual residence, they are generally not thought to be in acute need of international protection unless they are also refugees. However statelessness brings an added element of vulnerability, and in some countries stateless persons are in chronic need of protection. The Convention relating to the Status of Stateless Persons and the Convention for the Reduction of Statelessness provide valuable legal tools for their protection, but most countries where problems are most acute are parties to neither; only 18 countries have acceeded to the latter. UNHCR has been provisionally designated by the General Assembly as the body to which persons seeking to benefit from the provisions of this Convention can apply.[14] The prevention and reduction of statelessness and the protection of stateless persons are important for the prevention of potential refugee situations, and promoting accessions to the relevant conventions as well as the enactment of appropriate national legislation is part of UNHCR's prevention-related promotion activities.

67. If the absence of protection in countries of origin is the immediate cause of refugee flows as well as internal displacement, ensuring that such protection is provided by States, whose paramount responsibility it is, must be a principal goal of UNHCR's prevention strategies; it is also indispensible to achieve the solution of voluntary repatriation.

VI. CONCLUSION

68. The tasks of international protection that the international community has conferred upon the High Commissioner have to a certain extent outgrown the tools, particularly the legal tools, that are available to accomplish them. Significant numbers of people who are in need of international protection are outside the effective scope of the principal international instruments for the protection of refugees. The gaps in formal legal coverage are filled partially by a variety of regional instruments and declarations, national laws, and ad hoc practical arrangements relying on the considerable generosity and good will of States. However, to a large degree, ensuring that all those who need international protection receive it depends on the continuing initiative and vigilance of UNHCR, together with concerned Governments, with the indispensible support of the international community as a whole, including non-governmental organizations. While the likelihood of strengthening the system of international protection

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[14] GA res.3274(XXIX), 10 December 1974.

through a broader international refugee convention seems remote, international or regional declarations embodying guiding principles of international protection and reaffirming the commitment of States to ensuring, in cooperation with the High Commissioner, the protection of people who are forced to flee or remain outside their countries owing to armed conflict, widespread violence and/or grave abuses of human rights would be useful additions to the tools currently at hand. At the same time, it must be recognized that legal tools are only one element, although an important one, of international protection. The successful accomplishment of the High Commissioner's international protection mandate requires a global approach to the problem of coerced displacement, and protection, including first of all asylum, for those who need it, for so long as they need it, together with the promotion of conditions in countries of origin that will permit solutions for refugees and prevent future refugee problems through the protection of individuals in their own homes and their own countries. The comprehensive strategies required obviously far exceed the capacity of humanitarian agencies, but UNHCR will continue to do its part.

69. If the absence of protection for people within their own countries is the result of serious and intractable political, economic and social ills, implying a lack of solidarity between different groups and, often, the breakdown of the trust that should exist between citizens and their Governments, the response to the plight of refugees by the international community nonetheless demonstrates a countervailing strength of the world's peoples and of their Governments: the willingness to act on the basis of human solidarity and international cooperation and to provide refuge and assistance to millions of people who have been obliged to flee violence or persecution. Again and again, moved by a sense of common humanity, people and Governments in every region have reached out across geographical, ethnic, religious and linguistic barriers, and put aside narrow views of their national or individual interest in order to pursue this humanitarian objective. In constructing an international system for the protection of refugees under the auspices of the United Nations, the Governments of the world, on behalf of their citizens, have recognized, accepted, and continued to discharge a shared responsibility for the protection of people who are unable to avail themselves of the protection of their own Governments. In a period when the toll of human misery seems inexorably to rise, this near universal commitment to the protection of refugees constitutes a heritage of hope that must be preserved and strengthened.